

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SCI Towers, LLC - Application for)	File No. A0777131
Antenna Structure Registration –)	
Tyrone, Georgia)	
)	
Petition to Deny – James and Maria)	
Kachadurian)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 2013

Released: May 10, 2013

By the Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. SCI Towers, LLC (SCI Towers), a non-licensee tower company, filed an FCC Form 854 - Application for Antenna Structure Registration (Application), File No. A0777131,¹ for a proposed tower in Tyrone, Georgia (Tyrone tower). The Application contained an Environmental Assessment (EA). Neighboring landowners, James and Maria Kachadurian (Petitioners), filed a Petition to Deny (Petition) against the Application. SCI Towers filed an Opposition to Petition to Deny (Opposition). The Petitioners, through their counsel, filed a Reply to Opposition. SCI Towers filed a Response to Reply to Opposition.²

2. The Spectrum and Competition Policy Division (Division) of the Wireless Telecommunications Bureau has reviewed the EA, the Petition, and the associated pleadings. As explained below, the Division issues a Finding of No Significant Impact (FONSI) to the environment from the proposed Tyrone tower and grants the Application to register the tower. The Division also lifts the Stop Work Letter that it issued to SCI Towers on June 19, 2012,³ and

¹ FCC Form 854 - Application for Antenna Structure Registration and Environmental Assessment, SCI Towers, LLC, Tyrone, GA, File No. A0777131, filed June 9, 2012.

² Petition to Deny, filed by James and Maria Kachadurian, dated July 12, 2012; Opposition to Petition to Deny, filed by SCI Towers, dated July 25, 2012; Reply to Opposition, filed by James and Maria Kachadurian, dated August 3, 2012; and Response to Reply to Opposition, filed by SCI Towers, dated August 16, 2012.

³ See Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, to H. Lee Chapman, SCI Towers, LLC, dated June 19, 2012 (Stop Work Letter).

its prior oral order to stop construction issued on June 14, 2012. We reserve the right to initiate enforcement action against SCI Towers for beginning construction while the Application was still pending.⁴

II. BACKGROUND

3. On June 9, 2012, SCI Towers filed the Application to register the proposed Tyrone tower. The proposed tower would be 57.9 meters (approximately 190 feet) tall, and would be a self-supporting structure with no guy wires. Lighting is not required because the tower would be under 200 feet tall and would not be located within the glide slope of an airport.⁵

4. SCI Towers attached an EA to its application because the proposed Tyrone tower site includes approximately 0.06 acre of wetlands.⁶ The EA contained a report from Applied Environmental Science, Inc. (AES) evaluating the tower's effect on wetlands (AES Report). The EA additionally contained a permit from the U.S. Army Corps of Engineers (Corps), dated August 4, 2011, to construct in the wetland.⁷ The EA also addressed the other environmental factors listed in Section 1.1307 of the Commission's Rules implementing the National Environmental Policy Act of 1969 (NEPA).⁸

5. On June 13, 2012, the Division placed the Application with associated pleadings on public notice as accepted for filing. The Public Notice stated that interested parties could file a petition to deny within 30 days of the public notice.⁹ The Petition was filed in response to the Public Notice.

6. Meanwhile, on June 14, 2012, Maria Kachadurian called Division staff and indicated that someone was clearing trees at the Tyrone tower site. The Division called SCI Towers and orally ordered SCI Towers and its contractors to stop work on the proposed tower while the Application was pending. The Division then sent the Stop Work Letter to SCI Towers on June 19, 2012.

III. DISCUSSION

7. We have reviewed the EA, the Petition, and other pleadings in the public record to determine whether the Tyrone tower would have a significant impact on the environment.

⁴ See 47 C.F.R. § 1.1308.

⁵ See 47 C.F.R. § 17.7.

⁶ See 47 C.F.R. § 1.1307(a)(7); see also SCI Towers EA at 1-3 and Appendix C.

⁷ See EA, Appendix C.

⁸ See 47 C.F.R. § 1.1307(a), (b); see also the WTB NEPA Checklist at wireless.fcc.gov/siting/environmental-assessment.html (summarizing material to be included in an EA). NEPA is codified at 42 U.S.C. § 4321 *et seq.*

⁹ See Public Notice, Report No. CWS-12-60, dated June 13, 2012. We note that as of June 18, 2012, ASR applications with EAs are no longer placed on a Public Notice as accepted for filing, but are posted for comment for 30 days on the FCC's website, wireless2.fcc.gov/ASR/service/nationalNoticeReport.faces. See In the Matter of National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, *Order on Remand*, 26 FCC Rcd 16700 (2011).

Below, we address the specific arguments raised by the Petitioners and find that none of these arguments establish that the proposed Tyrone tower may have a significant environmental impact or otherwise requires further environmental processing. We also find, for the reasons set forth in the EA, that the tower will not have any other significant environmental impact.

8. Wetlands. The Petitioners first question the Corps permit allowing construction in the wetlands and assert that the site is flooded during parts of the year.¹⁰ Petitioners also point to language in the AES Report that is included in the EA stating, “As of the issuance date of this report, a grading plan has not been received for the project site.”¹¹

9. The EA demonstrates that SCI Towers consulted with the Corps on the proposed wetland construction. SCI Towers applied for a Corps permit on June 6, 2011. On August 4, 2011, the Corps issued a permit to construct in the wetland under Nationwide Permit No. 39 because it determined that the affected wetland area is “*de minimus*” [sic] at 0.06 acre.¹² In general, the Commission is guided by the expertise of the Corps in determining whether construction in a wetland may have a significant impact under Section 1.1307(a)(7) of the Rules.¹³ We therefore generally rely on the permit the Corps grants, along with any conditions, to allow construction in a wetland.¹⁴ Nothing in the record, including the absence of a grading plan in the EA, demonstrates any error or impropriety as to the permit issued by the Corps or provides a basis to disregard the Corps’s judgment regarding wetlands impacts. We thus reject Petitioners’ challenge to the application on this basis.

10. Floodplain. Second, the Petitioners assert that the EA fails to recognize that the proposed site would be located in a floodplain.¹⁵ Our review of the EA indicates that the proposed site is not in a floodplain. Specifically, SCI Towers submitted a Federal Emergency Management Administration (FEMA) Flood Insurance Rate Map (Rate Map) showing that the proposed tower would not be located in a FEMA-designated floodplain.¹⁶ The Commission uses the FEMA Rate Maps to determine whether a proposed facility will be located in a floodplain.¹⁷ Therefore, we reject petitioner’s assertions that the tower may significantly affect a floodplain.

11. Migratory Birds. The Petitioners also assert that the proposed tower will affect migratory birds protected under the Migratory Bird Treaty Act (MBTA).¹⁸ The Petitioners assert that the proposed tower is within proximity of a wetland, which the Wireless Telecommunications Bureau identified as a factor potentially increasing risks to migratory birds

¹⁰ See Petition at 2.

¹¹ See EA, AES Report at section 5.0.

¹² *Id.* at Appendix C; Letter from U.S. Army Corps of Engineers, Piedmont Branch, Permits Section, to SCI of Georgia, dated August 4, 2011.

¹³ See 47 C.F.R. § 1.1307(a)(7).

¹⁴ See WTB NEPA Checklist at 5 (requiring that applicant provide a copy of the permit received from the U.S. Army Corps of Engineers permitting the construction of the proposed antenna structure).

¹⁵ See Petition at 5.

¹⁶ See EA, Appendix B.

¹⁷ See WTB NEPA Checklist at 5 (requiring that applicant provide a copy of the section of the relevant FEMA map showing that the proposed antenna structure will not be located in a floodplain).

¹⁸ 16 U.S.C. § 703 *et seq.*

in its Programmatic Environmental Assessment (PEA).¹⁹ The Petitioners also assert that the proposed tower fails to comply with the voluntary guidelines on tower siting issued by the U.S. Fish and Wildlife Service (FWS Voluntary Guidelines).²⁰

12. Other than noting the tower's location in a wetland, Petitioners provide no evidence to support their assertion that this tower would significantly affect migratory birds. The PEA concluded that unlit towers that do not employ guy wires and are shorter than 200 feet, such as the Tyrone tower, are unlikely to have a significant effect on migratory birds, regardless of location.²¹ Furthermore, the only criterion under the FWS Voluntary Guidelines that the proposed tower allegedly does not meet is its location in a wetland. The mere location of the tower in a wetland is not sufficient to establish a significant effect on migratory birds. Therefore, we deny Petitioners' argument.

13. Radio Frequency (RF) Emissions. The Petitioners challenge the RF emissions determination in the EA, which concluded that the exposure levels will be within established FCC limits.²² Under the Commission's rules, licensees that provide service from the tower will be required to ensure compliance with the limits for maximum permissible exposure (MPE) established by the FCC.²³ These limits have been developed based on guidelines provided by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and the National Council on Radiation Protection and Measurements (NCRP). Both the NCRP and IEEE guidelines were developed by scientists and engineers with a great deal of experience and knowledge in the area of RF biological effects and related issues. Given that there are no antennae currently on the site or specifically proposed in the Application, it is infeasible at this time to evaluate whether future exposure levels at the Tyrone tower will exceed established limits. Therefore, it is premature to assert that the RF levels at the site will exceed the applicable MPE limits set forth in the Commission's rules.²⁴ If the Petitioners believe that a future licensee is not operating in compliance with the Commission's RF exposure limits, the Petitioners will have the opportunity to raise this issue with the Commission.

14. Alternative Sites. The Petitioners also contend that SCI Towers did not consider alternative sites for the proposed tower.²⁵ SCI Towers indicates that alternative sites were considered, contrary to Petitioners' assertions, and that the proposed tower location was moved due to the local government's review process.²⁶ We have reviewed the EA and the pleadings in the record. In its EA, SCI Towers indicates that it considered several factors while searching for available sites. Specifically, SCI Towers indicated that it studied radiofrequency coverage objectives, land use requirements, the willingness of private landowners to site the proposed tower, zoning requirements, and environmental sensitivity.²⁷ We find that SCI Towers complied

¹⁹ See Wireless Telecommunications Bureau Announces Release of Final Programmatic Environmental Assessment Of The Antenna Structure Registration Program, *Public Notice*, WT Docket Nos. 08-61 and 03-187, 27 FCC Rcd. 2492 (WTB 2012) (Attachment). See also www.fcc.gov/pea.

²⁰ See www.fws.gov/habitatconservation/com_tow_guidelines.pdf.

²¹ See PEA at 3-7 to 3-8.

²² See Petition at 7.

²³ See 47 C.F.R. § 1.1310.

²⁴ See In the Matter of Michael Pearson, *Order*, 27 FCC Rcd 8043, 8045 (WTB/SCPD 2012).

²⁵ See Petition at 5-6.

²⁶ See Opposition to Petition to Deny at 8-9.

²⁷ See EA at 2.

with Section 1.1311 of the Commission's rules by studying alternative sites in order to minimize potential environmental impacts.²⁸ Therefore, we deny the Petitioners' argument.

15. Public Controversy. Lastly, the Petitioners argue that the matter is controversial and that the Commission must therefore prepare an Environmental Impact Statement.²⁹ The Petitioners state that 75 citizens in the community signed a petition opposing the tower.³⁰ The Petitioners did not attach the citizens' petition to their Petition to Deny the Application. In their Reply, the Petitioners indicate the citizens' petition was filed in the local zoning proceeding.³¹ The Petitioners also assert that there is pending litigation involving another proposed tower site in the community.³² SCI Towers responds that the mere existence of a local controversy does not create an environmental controversy.³³

16. It is well established that mere opposition to a proposed tower does not create a significant "controversy" within the meaning of NEPA unless the effects on the quality of the human environment are likely to be controversial.³⁴ Here the local government's consideration of SCI Towers' proposal apparently engendered controversy. Petitioners have not established, however, that any controversy is present regarding the tower's environmental effects, nor have they presented evidence that any party other than the Petitioners objects to the tower on environmental grounds. Petitioners' numerous allegations regarding the local zoning decision and the litigation affecting another tower are beyond the scope of NEPA and, by extension, this proceeding. Accordingly, we reject Petitioners' request for an EIS because a substantial dispute as to the environmental effects of the proposed tower has not been demonstrated.

IV. CONCLUSION

17. The Division denies the Petition. Upon review of the EA, and based on the entire administrative record, the Division FINDS that the proposed Tyrone tower will have no significant impact on the human environment, as required by Section 1.1308 of the Commission's rules. The Division grants the Application for Antenna Structure Registration Authorization (Form 854). The Division lifts the Division's Stop Work Letter, issued June 19, 2012, and its prior oral order on June 14, 2012, to stop construction. SCI Towers, LLC may proceed to construct the Tyrone tower.

²⁸ See 47 C.F.R. § 1.1311(a)(4).

²⁹ See Petition to Deny at 4. See 40 C.F.R. § 1508.27(b)(4) (under NEPA, "the degree to which the effects on the quality of the human environment are likely to be highly controversial" should be considered when deciding whether an action may have a significant effect); 47 C.F.R. §§ 1.1305 and 1.1314-1.1319 (FCC rules concerning Environmental Impact Statements).

³⁰ See Petition to Deny at 5.

³¹ See Reply to Opposition at 4.

³² See *id.* at 7-8.

³³ See Response to Reply to Opposition to Petition to Deny at 2.

³⁴ See *Application of S-R Broadcasting Co., Inc.*, 27 FCC Rcd 11499, 11500 & n.4 (2012), citing *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) ("The term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use") (italics in the original); see also *In the Matter of T-Mobile and Pierce Archery, Memorandum Opinion and Order*, 18 FCC Rcd. 24993, 24996 (WTB/SCPD 2003).

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.939(b) and 1.1313(a) of the Commission's Rules, 47 C.F.R. §§ 1.939(b) and 1.1313(a), that the Petition to Deny filed by James and Maria Kachadurian IS DENIED.

19. IT IS FURTHER ORDERED, pursuant to Section 303(q) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(q), and Section 17.4 of the Commission's rules, 47 C.F.R. § 17.4, that the Application for Antenna Structure Registration (FCC Form 854), filed by SCI Towers, LLC, IS HEREBY GRANTED.

20. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.3, 1508.9 and 1508.13, and Section 1.1308 of the Commission's Rules, 47 C.F.R. § 1.1308, that the Division FINDS grant of the Application will have no significant impact on the environment.

21. IT IS FURTHER ORDERED that the Oral Order To Stop Construction issued on June 14, 2012, and the Stop Work Order Letter issued on June 19, 2012, respectively, by the Spectrum and Competition Policy Division ARE LIFTED.

22. IT IS FURTHER ORDERED, pursuant to Sections 1501.4(i) and 1506.6 of the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.4(i) and 1506.6, and Section 1.1308 of the Commission's Rules, 47 C.F.R. § 1.1308, that applicant SCI Towers, LLC is to provide to the community to be served by this facility notice of the finding herein of no significant impact.

23. The Spectrum and Competition Policy Division reserves the right to refer this matter to the Enforcement Bureau for investigation and possible enforcement action concerning SCI Towers, LLC's premature construction in apparent violation of Section 1.1308 of the Commission's Rules.

24. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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